DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
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DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. D.C. ARC, INC. and SHIRLEY WADE Respondents	Case No.: I-00-40080

ORDER DENYING MOTION TO DISMISS

I. Introduction

The Government commenced this case by serving a Notice of Infraction on January 6, 2000, charging Respondents with violating 22 DCMR 3523.1. The Notice of Infraction alleged that the violation took place at a group home operated by Respondents at 121 Tuckerman Street, N.E. (the "Tuckerman Facility"). Respondents filed a timely plea of Deny, along with a letter from their counsel dated January 28, 2000, alleging various defects in the Notice of Infraction.[1] On February 11, 2000, Chief Administrative Law Judge Klein issued an order noting that the precise purpose of that letter was unclear and that this administrative court "would be better able to evaluate the merits of the arguments advanced by Respondents if a more structured and analytical document were provided." Accordingly, the February 11 order allowed Respondents

[1] In a related case, Respondents filed a request for a hearing to challenge the Government's decision – later withdrawn – to seek termination of their provider agreement. That case (No. C-00-80006) was dismissed on March 27, 2000 and is currently on appeal to the Board of Appeals and Review.

to supplement their letter "with a submission clarifying the relief they seek, and presenting points and authorities or other support."

On February 25, 2000, Respondents filed a document entitled "Supplemental Information," indicating that they were submitting it in support of a motion to dismiss. They also filed an affidavit and exhibits and requested that the Notice of Infraction be dismissed on several grounds. The Government filed a reply on March 15, 2000. Except as noted below, I have treated Respondents' Supplemental Information as a memorandum in support of a motion to dismiss for failure to state a claim upon which relief can be granted, as Respondents claim, based on the Notice of Infraction alone, that the Government can not recover a civil penalty as a matter of law. For the reasons stated below, I will deny Respondents' motion.

II. The Notice of Infraction Contains a Proper Date.

According to Respondents, the Notice of Infraction alleges that the violation at issue occurred on December 21, 1999. Because Respondents' records demonstrate that the inspector who issued the notice did not visit the group home on December 21, they contend that she could not have observed a violation on that date. Unlike Respondents' other arguments, this contention is in the nature of a summary judgment motion, as it asks this administrative court to consider factual matters beyond the allegations of the Notice of Infraction.

The Government does not dispute Respondents' contention that the inspector was not present at the group home on December 21 but it contests the materiality of that undisputed fact. It notes that the December 21 date is inserted in a portion of the Notice of Infraction labeled

"Date of Infraction/Infraction Determined," and argues that December 21 is the date when the inspector concluded her investigation and decided that a violation had occurred, although it occurred on an earlier date.

Although it would have been preferable for the inspector to have crossed out the inapplicable term, I accept the Government's representation that December 21 is the date the infraction was determined, not the date when it occurred.[2] It was appropriate, therefore, for the inspector to insert December 21 as the "Infraction Determined" date. Thus, the inspector's absence from the group home on December 21 is immaterial, and Respondents' motion on this ground must be denied.

III. Respondents Have Received Adequate Notice of the Charge.

The Notice of Infraction cites 22 DCMR 3523.1 and states that the nature of the infraction is "failure to protect residents [sic] rights." The notice itself provides no additional factual allegations or references to specific rights of a resident or residents that the Respondents failed to protect. Accordingly, Respondents contend that the Notice of Infraction does not provide sufficient notice of the charges against them.

Section 3523.1 requires residence directors of Group Homes for Mentally Retarded Persons ("GHMRP") to "ensure that the rights of residents are observed and protected in

[2] This means, of course, that the Government will be estopped from proving that the inspector observed an infraction on December 21. See generally *Lofchie v. Washington Square Limited Partnership,* 580 A.2d 665, 668 (D.C. 1990) (Schwelb, J. concurring); *Pergram v. Hedrich,* 120 S. Ct. 2143, 2153 n.8 (2000).

accordance with D.C. Law 2-137, this chapter [i.e., DCMR Chapter 35], and other applicable District and federal laws". This administrative court recently considered the requirements of proper notice in a case arising under 22 DCMR 3523.1. The decision in *DOH v. Multi-Therapeutics, Inc.* No. I-00-40087, 40094 (June 26, 2000), held that § 3523.1 does not create any substantive rights, but "simply requires [group home operators] to observe and protect the rights granted to residents by other laws and regulations." *Multi-Therapeutics,* at 22.[3] As a result, the Government can establish a violation of § 3523.1 only by establishing that Respondents violated some other requirement of federal or District of Columbia law, and the Government must inform the Respondents of the specific legal requirements that allegedly were violated. Id.

Although the Notice of Infraction in this case does not cite any law or regulation that Respondents allegedly violated other than § 3523.1, that omission is not necessarily fatal to the Government's case. *Multi-Therapeutics* noted that the Government usually issues a Statement of Deficiencies and Plan of Correction form (a "Deficiency Statement") in cases involving alleged violations at group homes for the mentally retarded, and held that the information contained in that form is deemed to be incorporated into a Notice of Infraction for the purpose of evaluating the adequacy of the notice provided to Respondents. *Multi-Therapeutics* at 10.

The record in the companion case involving the Respondents – No. C-00-80006 – contains a fourteen-page Deficiency Statement (Form 2567) issued by the District of Columbia on behalf of the Health Care Financing Administration ("HCFA") for the Tuckerman Street Facility. That statement identifies specific federal regulations that Respondents allegedly

[3] For the convenience of the parties, a copy of the *Multi-Therapeutics* decision is attached to this opinion.

violated and provides a summary of the facts that allegedly demonstrate the violations. The statements in the HCFA Deficiency Statement were sufficiently specific for Respondents to prepare a nine-page rebuttal that discusses the various regulations cited by the Government and states Respondents' reasons for believing that they did not violate any of those regulations.[4] Accordingly, as in *Multi-Therapeutics*, the Notice of Infraction and the Deficiency Statement sufficiently apprise Respondents of the nature of the Government's claims, including the rights that allegedly have been violated and the facts that allegedly support those claims.[5] Because Respondents have sufficient information to understand the allegations against them and to prepare a defense, their motion to dismiss for insufficient notice of the charge must be denied. *Watergate Improvement Associates v. Public Service Commission,* 326 A.2d 778, 786 (D.C. 1974).

IV. Respondents Were Not Entitled to an Opportunity to Cure.

Respondents contend that issuance of the Notice of Infraction was improper because they were given no opportunity to cure the alleged violation. They rely upon 16 DCMR 3101.6, which provides: "When applicable provisions of law require that a respondent be given a certain period of time to abate a violation, an NOI shall not be issued until that period of time has elapsed." Respondents assert that both federal and District of Columbia regulations are applicable provisions of law requiring that they be given an opportunity to abate the alleged

[4] That rebuttal – a February 25, 2000 letter signed by Respondents' counsel – originally was filed with the Office of Adjudication of the Department of Consumer and Regulatory Affairs, but is now part of the record in Case No. C-00-80006 in this administrative court.

[5] Should the Government allege that Respondents violated a resident's or residents' rights in a manner not reflected on the HCFA Form 2567, it must inform Respondents within the deadline established below.

violation. They argue that the NOI is therefore invalid because they did not receive such an opportunity before the NOI was issued.

Even if 16 DCMR 3101.6 is applicable in this case[6], issuance of the Notice of Infraction was consistent with that regulation. Section 3101.6 simply requires an agency issuing a Notice of Infraction to allow the Respondent an opportunity to abate the violation if applicable law requires an abatement period as a precondition to the issuance of a Notice of Infraction. None of the regulations cited by Respondents contains any such precondition.

The federal regulations that Respondents apparently intended to cite contain various requirements for certifying Intermediate Care Facilities for the Mentally Retarded ("ICF/MR").[7] Such certification is a prerequisite to obtaining Medicaid funding for such facilities. In some circumstances, the regulations permit facilities to receive certification even if they do not comply fully with all federal standards, provided that the facility has submitted an acceptable plan for correcting the deficiencies. 42 CFR §§ 442.101(d)(3)(ii); 442.105(b); 442.110(c)(2). As even Respondents themselves state, those regulations allow "an opportunity to correct the alleged deficiencies before penalties such as termination or denial of payments for new admissions is [*sic*] imposed." Respondents' Supplemental Information at 7. (Emphasis added.) The federal

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[6] Chapter 31 of 16 DCMR contains procedural regulations promulgated by the Department of Consumer and Regulatory Affairs to implement the Civil Infractions Act. Because authority to adjudicate violations of the group home regulations has been transferred to a new tribunal – the Office of Adjudication and Hearings in the Department of Health – the extent to which DCRA's procedural regulations control in this case is not clear.

[7] In their Supplemental Information, Respondents cited various portions of 42 CFR Part 422, which have nothing to do with the issue at hand. They apparently intended to refer to 42 CFR Part 442, which governs Medicaid certification for group homes like the Tuckerman Street Facility.

regulations, therefore, are not an obstacle to the issuance of a Notice of Infraction or the imposition of a civil fine by the District of Columbia. Instead, by Respondents' own admission, they permit a facility to correct violations that otherwise might lead to the denial of Medicaid funds.

Respondents also claim that 22 DCMR 3105.8 requires that they be given an opportunity to correct any violations before a Notice of Infraction is issued. Respondents are wrong, for two reasons. First, nothing in § 3105.8 or any other portion of 22 DCMR 3105 grants a group home operator a right to cure a violation before the Government may issue a Notice of Infraction. Section 3105 sets forth procedures for the Government to follow when it seeks to suspend or revoke a license (22 DCMR 3105.7) or to issue a provisional or restricted license (22 DCMR 3105.9). Nothing in § 3105 limits the Government's authority to issue Notices of Infraction in any way. Second, § 3105 governs only inspections undertaken in response to complaints received from outside the Department of Health. Because there is no evidence that the investigation in this case was prompted by such a complaint, § 3105.8 is inapplicable.

Because the Government was not required to afford Respondents an opportunity to cure the alleged violation before issuing the Notice of Infraction, Respondents' motion to dismiss on this ground must be denied.

V. Imposition of a Civil Fine is Authorized.

Respondents contend that the Notice of Infraction furnishes no basis for determining whether there is authority for the imposition of a civil fine in this matter. This appears to be a variant of their defective notice argument discussed above. They note that the Department of Health first prescribed a civil fine for violations of 22 DCMR 3523.1, effective December 7, 1999.[8] They appear to contend that only violations occurring on or after December 7, 1999 are punishable and that the Notice of Infraction does not state whether their alleged violation occurred before or after that date.

Section 3523.1 was first promulgated in 1992. Thus, this case does not involve any attempt to establish a new standard of conduct for group home operators. The regulation that took effect on December 7, 1999 simply established an additional remedy for a violation of that pre-existing standard. Respondents do not cite any authority to support their claim that the establishment of that new remedy or its application to events prior to December 7 is impermissible. Because these proceedings against Respondents are civil, imposition of a retroactive fine does not violate the Ex Post Facto Clause of the Constitution. *Kansas v. Hendricks,* 521 U.S. 346 (1997); *Karpa v. Commissioner,* 909 F.2d 784 (4th Cir. 1990). Thus, Respondents have failed to demonstrate any basis for dismissing the Notice of Infraction, even if the Government seeks a civil fine for violations that may have occurred before December 7.

[8] An emergency rule, effective December 7, 1999, first established a $1,000.00 fine for violating § 3523.1. 46 DC Reg. 10350 (December 17, 1999). A permanent rule now contains the same provision. 47 D.C. Reg. 3209 (May 5, 2000).

VI. Conclusion.

For the reasons stated above, it is, this _____ day of _____, 2000:

ORDERED, that Respondents' motion to dismiss the Notice of Infraction is **DENIED;** and it is further

ORDERED, that the parties shall appear for a pre-hearing conference in this matter on August 17, 2000 at 10 A.M. at the Office of Adjudication and Hearings, 825 North Capitol Street, Suite 5100, Washington, D.C. to discuss setting a hearing date and any other matters necessary to bring about a just, prompt and efficient resolution of this case; and it is further

ORDERED, that on or before August 15, 2000, the Government shall file with the Clerk a copy of any Statement of Deficiencies and Plan of Correction ("Deficiency Statement") that relates to the facts at issue in this case other than the HCFA Form 2567 referred to previously in this Order, and shall serve a copy upon Respondents; and it is further

ORDERED, that, if the Government's claim of failure to protect resident's rights depends upon any violation of law other than those alleged in the HCFA Form 2567 or any other Deficiency Statement filed pursuant to the previous paragraph, it shall file with the Clerk and serve upon Respondents a short plain statement identifying both the facts supporting any such alleged violation and the law or regulation allegedly violated. Such statement shall be filed and served by August 15, 2000; and it is further

ORDERED, that failure of the Government to comply with the preceding paragraph shall preclude it from supporting its claim of a violation of 22 DCMR 3523.1 with evidence of any violation other than those alleged in the HCFA Form 2567 or any other Deficiency Statement filed in compliance with this order.

/s/ 7/24/00

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John P. Dean
Administrative Judge